BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

KEVIN TAYLOR	)	
Claimant	)	
VS.	)	
	)	Docket No. 255,042
ASPLUNDH TREE EXPERT CO.	)	
Respondent	)	
AND	)	
	)	
RELIANCE NATIONAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the February 12, 2002 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on August 6, 2002.

APPEARANCES

Andrew E. Busch of Wichita, Kansas, appeared for claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

The Board notes two medical records were attached to the parties' stipulation regarding average weekly wage that was filed with the Division of Workers Compensation on February 6, 2002. The first medical record is an August 22, 1995 letter from Dr. Lawrence R. Blaty to attorney Michael Silver and the second document is a July 27, 1994 medical note that may have been authored by Dr. Robert Eyster. The stipulation does not reference those documents. At oral argument before the Board, it was determined that the parties had not agreed that those medical records were part of the evidentiary record.

Accordingly, those documents, which were not otherwise entered into evidence, are not part of the record and were not considered by the Board in deciding this claim.

ISSUES

Claimant alleges he injured his low back while working for respondent beginning December 8, 1999, when he slipped and fell, and each and every workday thereafter through his last day of working for respondent in May 2001. In the February 12, 2002 Award, Judge Clark determined claimant sustained an 85 percent permanent partial general disability, which was based upon a 70 percent task loss and a 100 percent wage loss. The Judge used December 8, 1999, as the date of accident.

Respondent and its insurance carrier contend Judge Clark erred. They argue (1) claimant lacks credibility and, therefore, he has failed to prove that he injured his back on December 8, 1999, while working for respondent, (2) if claimant did sustain a work-related injury, the accident occurred on December 8, 1999, rather than as a series through the last day that claimant worked for respondent, (3) claimant failed to present evidence that he sustained additional functional impairment as a result of the December 8, 1999 accident, and, in the alternative, sustained only a 10 percent whole body functional impairment, (4) claimant failed to provide respondent with timely notice of accident as he allegedly did not inform respondent of the accident until January 19, 2000, (5) claimant's permanent partial general disability should be limited to the functional impairment rating as respondent returned claimant to accommodated work following back surgery at a wage comparable to his pre-injury wage, but claimant was subsequently terminated for violating company rules, (6) claimant did not sustain a wage loss due to his back injury, (7) claimant failed to prove a task loss as the evidence presented establishes only a general description of claimant's former jobs rather than the actual work tasks required to perform those jobs, and (8) any award of future medical benefits should only be upon proper application to the Director.

Accordingly, respondent and its insurance carrier request the Board to deny claimant's request for compensation. In the alternative, they request the Board to reduce claimant's permanent partial general disability to the functional impairment rating.

Conversely, claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?

2. If so, what is the date of accident or dates of accident?

3. Did claimant provide respondent with timely notice of the accidental injury?

4. If so, what is the nature and extent of claimant's injury and disability?

5. Should any benefits awarded be reduced due to preexisting functional impairment?

6. Should any award for future medical benefits be conditioned upon making application to the Director?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant injured his back on or about December 8, 1999, when he slipped and fell while working for respondent. Claimant slipped on an icy driveway and hit his back on a curb. At the time of the accident, claimant was inspecting a job site to determine how to best remove tree limbs from a customer's back yard. The accident arose out of and in the course of claimant's employment with respondent, a tree services company.

2. Claimant first informed his immediate supervisor, Michael Edgecomb, about the accident the next day. Claimant again talked with Mr. Edgecomb about his accident at the end of that week when they were completing timecards. The Judge found claimant's testimony regarding notice of the accident credible and so does the Board.

3. Following the accident, claimant continued to work for respondent, performing his regular duties as a foreman. After requesting medical treatment from respondent on several occasions, claimant finally saw a doctor on February 22, 2000, and began receiving physical therapy. When claimant's back complaints did not resolve, he was referred to Dr. Paul Stein who in May 2000 operated on claimant's back, performing a discectomy at the L5-S1 intervertebral level. Claimant later treated with Dr. Anthony G. A. Pollock. Claimant was eventually referred to Dr. Jon Parks for pain management. When claimant last testified in December 2001, he remained under Dr. Parks' treatment and was taking several medications.

4. After recovering from surgery, in approximately June 2000 claimant returned to work for respondent. Respondent generally accommodated claimant by not requiring him to climb trees or lift heavy objects. Respondent also turned claimant's truck into a chipping truck.

5. Respondent terminated claimant on May 16, 2001, for failing to place the proper warning signs at a work site. Claimant placed a warning sign in front of his truck but the

other foreman at the site failed to place a sign behind the second truck. Because claimant was a foreman, respondent held him responsible for all the warning signs at the site. The other foreman was disciplined but he was not terminated. Claimant worked for respondent altogether for approximately 19 years.

6. Before being terminated, claimant was reprimanded on several occasions about placing the proper warning signs at a work area. On June 22, 2000, claimant was given a verbal warning about not having signs posted. On September 13, 2000, claimant was given a written warning about not having warning signs posted. On November 3, 2000, claimant was again reprimanded for failing to post the proper warning signs and was taken off work for three days without pay and warned that the next disciplinary step would be termination. Finally, on February 28, 2001, claimant received another written reprimand and another three-day suspension from work without pay for failing to post warning signs. That reprimand also stated that the next infraction would result in termination.

7. In July 2001, when he testified at the regular hearing, claimant was unemployed and receiving unemployment benefits. In December 2001, when claimant last testified at a preliminary hearing, claimant remained unemployed but he was looking for work.

8. The parties stipulated that claimant's average weekly wage before the accident was $791.73. When claimant returned to work for respondent in approximately June 2000 after recovering from back surgery, claimant was paid $14.76 per hour. Before the accident, claimant received overtime. But after the accident, claimant received very little overtime and generally worked only 40 hours per week. According to Mr. Edgecomb, claimant was not selected to work out of town as he could not be trusted to perform the work assigned. Therefore, claimant lost the considerable amount of overtime that he was given before the accident.

9. The Board finds claimant's post-injury average weekly wage following the accident through the date that he was terminated on May 16, 2001, was approximately $590.40 ($14.76 per hour x 40 hours) per week. After that date, claimant became unemployed and, thus, his post-injury earnings were reduced to zero.

10. Claimant did not present a task analysis from an expert to establish his work tasks. Instead, claimant testified at the regular hearing about the work he had performed in the 15-year period before this back injury. While working for respondent, claimant climbed and trimmed trees, taught others how to climb and trim trees, kept paperwork, talked with customers, supervised his crew, drove trucks, dragged brush and limbs, and operated a hydraulic chipper. Claimant also worked for two construction companies as a laborer working on concrete construction projects. In those jobs, claimant set up concrete forms which required him to lift and set up 16-foot two-by-twelves, shoveled dirt and sand, leveled dirt and sand, and placed "screens" that were used in the project. But claimant did not

finish the concrete. The Board finds claimant identified approximately 12 work tasks that he performed in the 15-year period before the December 1999 accident.

11. Respondent and its insurance carrier hired Dr. Philip R. Mills to evaluate claimant. The doctor examined claimant on September 24, 2001, and diagnosed scarring, or arachnoiditis, where claimant had the L5-S1 discectomy. The doctor also concluded that claimant's subjective complaints, which included sharp low back pain radiating into the buttocks and hips from the legs to the toes, were compatible with the objective findings.

12. Using the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*), Dr. Mills determined claimant had a 13 percent whole body functional impairment. The doctor assigned light/medium work restrictions to claimant, which would limit claimant from lifting greater than 25 pounds at any time; from repetitive bending, twisting, lifting, and stooping; and from working in awkward positions. Dr. Mills did not testify about the number of former work tasks that claimant had lost due to the December 1999 back injury.

13. Finally, Dr. Mills noted that he was uncomfortable with the narcotic OxyContin, which claimant was taking at that time with two other medications – Neurontin and Zoloft. The doctor believes there is a substantial risk of addiction for those who take narcotic medications over an extended period and, therefore, narcotics should not be prescribed for individuals with chronic pain. Although being uncomfortable with the narcotic being prescribed to claimant, the doctor was not asked his opinion of whether claimant needed ongoing medical treatment. On the other hand, Dr. Mills noted that claimant had chronic pain but the doctor did not find significant pain behavior and claimant's pain drawing did not reveal findings that suggested symptom magnification.

14. Claimant hired Dr. Daniel D. Zimmerman for an evaluation and to testify in this claim. The doctor examined claimant in June 2001 and, using the fourth edition of the AMA *Guides*, the doctor found claimant sustained an 18 percent whole body functional impairment due to the December 1999 back injury. The doctor recommended the following work restrictions for claimant:

> Mr. Taylor is capable of lifting 20 pounds on an occasional basis, 10 pounds on a frequent basis. He should avoid frequent flexing of the lumbosacral spine and, hence, should avoid frequent bending, stooping, squatting, crawling, kneeling, and twisting activities as such activities, repetitively carried out or carried out over extended periods of time, would be likely to increase pain and discomfort affecting the lumbar paraspinous musculature.

15. Dr. Zimmerman reviewed claimant's testimony from the regular hearing regarding the jobs and tasks that he had performed in the 15-year period before the December 1999 back injury. The doctor indicated that claimant should not drive the trucks used by

respondent; should not climb trees to train his crew; should not climb to trim trees; should not clear the heavier branches and brush; should not use the chipper as the weight of the heavier limbs and brush would exceed the doctor's lifting restrictions and the repetitive bending and stooping required to do that task would be outside the work restrictions involving those physical movements; should not set up and tear down concrete forms; should not lay out and level dirt and sand used in the concrete construction projects; and should not shovel the dirt and sand used in those projects. According to Dr. Zimmerman, claimant has lost approximately eight work tasks out of the approximately 12 work tasks (or approximately 67 percent) that he performed in the 15-year period before the December 1999 injury.

16. Finally, Dr. Zimmerman was also concerned about possible addiction considering the narcotic medication that claimant was taking. In his June 7, 2001 report, Dr. Zimmerman stated that claimant's pain could be treated with heat and that claimant should be closely supervised by the physician who is prescribing claimant's medications.

17. Respondent and its insurance carrier presented the testimony of orthopedic surgeon Dr. Anthony G. A. Pollock, who was one of claimant's treating physicians. Dr. Pollock, who last saw claimant on December 28, 2000, found claimant had a 10 percent whole body functional impairment under the fourth edition of the AMA *Guides*. The doctor did not believe claimant had arachnoiditis but only epidural fibrosis that had developed from claimant's back surgery. The doctor also believed claimant had a failed one-level disc surgery. Relying upon a functional capacities evaluation, the doctor believes claimant should be restricted to light work, which would limit his lifting to 25 pounds maximum, 20 pounds on an occasional basis, and 10 pounds on a frequent basis, but no constant lifting. The doctor placed no restrictions on claimant as far as squatting, kneeling, climbing stairs or ladders, standing, walking, reaching forward or above the shoulders, fine hand manipulations or simple grasping.

18. Dr. Pollock also reviewed claimant's regular hearing testimony and indicated that claimant probably should not climb and trim trees if he were required to climb while holding on to equipment weighing 20 to 25 pounds but that claimant probably should be able to drive the large trucks used by respondent. The doctor also indicated claimant probably should not perform the task of on-the-job training if it required climbing trees while holding on to chain saws and other equipment or perform that task more than occasionally. Moreover, the doctor indicated claimant should not remove the heavier limbs and brush due to the weight and the bending and twisting involved; claimant should not feed wood into the hydraulic chipper due to the weight and bending involved; he should not set up concrete forms; and he should not shovel dirt and sand. According to Dr. Pollock, claimant has lost the ability to perform approximately six work tasks out of the approximately 12 former work tasks (or 50 percent) that he performed in the 15 years before the December 1999 accident.

19. Dr. Pollock is also concerned about the high dosage of OxyContin and the other medications that Dr. Parks is prescribing claimant. Dr. Pollock did not testify that claimant no longer needed medical treatment but, instead, in October 2000 prescribed a TENS unit for claimant to use. The doctor was not asked his opinion of whether claimant needed ongoing medical care.

20. The Board is not persuaded that either doctor's task loss opinion is more credible than the other. Accordingly, the Board averages the 67 percent task loss percentage derived from Dr. Zimmerman's testimony with the 50 percent task loss percentage derived from Dr. Pollock's testimony and finds that claimant has sustained a 59 percent task loss due to the December 8, 1999 accident and resulting back injury.

21. Claimant experienced back problems before the December 1999 accident. Claimant filed at least one workers compensation claim for an earlier back injury and in December 1996 entered into a settlement. The evidentiary record, however, does not establish the extent, if any, of claimant's functional impairment immediately before the December 1999 accident.

22. As indicated above, claimant is receiving ongoing medical care from Dr. Jon Parks. At the December 20, 2001 preliminary hearing, respondent and its insurance carrier's attorney stated that Dr. Parks was the authorized physician.

CONCLUSIONS OF LAW

1. The Award should be modified to decrease claimant's permanent partial general disability from 85 percent to 42 percent.

2. Because claimant's back injury is compensated as an "unscheduled" injury, his permanent partial general disability is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[1] and *Copeland*.[2] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job that the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon the post-injury ability to earn wages rather than the actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[3]

The Court of Appeals in *Watson*[4] recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the worker's residual capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder [sic] must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[5]

The Board concludes claimant's permanent partial general disability through the date that he was terminated should be based upon a wage loss of 25 percent (comparing the pre-injury stipulated wage of $791.73 to the post-injury wage of $590.40). In light of the fact that claimant worked for respondent for approximately 19 years and was given the responsibility to supervise a crew that sometimes performed dangerous work around power lines, the Board is not persuaded by respondent and its insurance carrier's argument that

---

[1] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *Copeland*, p. 320.

[4] *Watson v. Johnson Controls, Inc.*, ___ Kan. App. 2d ___, 36 P.3d 323 (2001).

[5] *Watson*, Syl. 4.

claimant was not given overtime as he could not be trusted. The Board agrees with Judge Clark's observation that the testimony from claimant's immediate supervisor, Mr. Edgecomb, was not always credible. Accordingly, for the period through May 16, 2001, claimant has a 42 percent permanent partial general disability based upon a 25 percent wage loss and a 59 percent task loss.

The Board concludes claimant's termination was based upon his failure to follow company rules. Based upon this evidence, the Board is unable to conclude that claimant's termination was the result of bad faith on the part of respondent. Conversely, claimant's termination is tantamount to refusing to work. Accordingly, the Board will impute a post-injury wage based upon claimant's residual ability to earn wages. The Board will impute the post-injury wages that claimant was earning while working for respondent as claimant has demonstrated the ability to earn those wages and the record indicates claimant would still be working that job and earning those wages if not for his failure to comply with company rules. Accordingly, for the period commencing May 17, 2001, claimant's permanent partial general disability remains at 42 percent.

3. The Award should not be reduced under the provisions of K.S.A. 1999 Supp. 44-501(c) as respondent and its insurance carrier failed to prove the amount, if any, of claimant's functional impairment before the December 1999 accident.[6]

4. The request to require claimant to file an application for additional medical treatment and obtain approval before receiving such treatment is denied. The record indicates that claimant has ongoing pain and has been referred to Dr. Parks, a pain management specialist. And Dr. Parks is an authorized medical provider. To require claimant to apply for treatment on every occasion that he may need to consult with a doctor or obtain a prescription for medications is overly burdensome and would only comprise an unnecessary obstacle in claimant receiving reasonably necessary medical care. No physician testified that claimant did not need ongoing medical treatment. As it appears respondent and its insurance carrier's concern is whether claimant is being improperly medicated, that issue is one that they may present in a post-Award proceeding. That was not an issue which was raised when the Judge took stipulations and listed the issues at regular hearing. Accordingly, the Board awards claimant ongoing medical treatment.

5. The Board adopts the Judge's findings and conclusions as set forth in the Award to the extent they are not inconsistent with the above.

---

[6] See *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* ___ Kan. ___ (2001).

AWARD

WHEREFORE, the Board modifies the February 12, 2002 Award and decreases claimant's permanent partial general disability from 85 percent to 42 percent.

Kevin Taylor is granted compensation from Asplundh Tree Expert Co. and its insurance carrier for a December 8, 1999 accident and resulting disability. Based upon an average weekly wage of $791.73, Mr. Taylor is entitled to receive 174.30 weeks of permanent partial disability benefits at $383 per week, or $66,756.90, for a 42 percent permanent partial general disability, making a total award of $66,756.90.

As of September 5, 2002, claimant is entitled to receive 143.14 weeks of permanent partial general disability compensation at $383 per week in the sum of $54,822.62, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $11,934.28 shall be paid at $383 per week until paid or until further order of the Director.

Claimant is entitled to receive ongoing medical care until further order.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Andrew E. Busch, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation